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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

## No. 58.

HENRY A. CRANE, PLAINTIFF IN ERROR,

*vs.*

CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS, AND TIMOTHY HOPKINS, DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

## REPLY BRIEF OF PLAINTIFF IN ERROR.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23573

(19,815.)

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## REPLY BRIEF OF PLAINTIFF IN ERROR.

Opposing counsel have stipulated, allowing plaintiff in error to file a reply brief, and we submit the following observations:

Defendants in error make really one point, viz., "That the permission granted to make payment carried with it the right to remain in possession."

It could not be suggested that, in his petition for a rehearing, Buckley asked for permission to remain in possession without paying for the land, or that the court in its order on such petition dealt with the question of possession at all.

It is suggested, however, that the case where title is reserved in the vendor is to be likened to a mortgage, and

cases are cited to show that such a transaction is somewhat akin to a mortgage. It is then claimed that, in the case of a mortgage, the right to redeem and the right to remain in possession are coincident.

Counsel have cited certain California cases to show the relationship between the right to redeem and to remain in possession. While it will be conceded that the rights of the vendor under an agreement to convey are greater than those of the mortgagee, counsel are claiming greater rights for the vendee under such agreement than a mortgagor could possibly have.

Under section 945 of the Code of Civil Procedure of the State of California, a mortgagor cannot postpone a sale by an appeal without giving a bond to the mortgagee to indemnify him in case of affirmance of the judgment.

In the case at bar counsel claim that they can, by merely obtaining an extension of the right to redeem, obtain the right to remain in possession, while they deny to the vendor the benefit of any security.

The argument of counsel leads to the absurd conclusion that in a case like that at bar the Appellate Court could not extend the vendee's right to redeem for a single instant without depriving the vendor of the use of his premises for perhaps many years. Courts of equity are not so restricted, and such a conclusion is not to be arrived at by mere analogy.

By their second point counsel claim that the obtaining the right to redeem carried with it the right to remain in possession, and in their brief, for the first time during this litigation, claim that the extension was granted because the appellate court thought the time originally granted was too short. In their zeal to make this point they have stated that the time granted was "less than half a month," when in reality it is a month and a half, the date of the decree being November 16, 1898, and the time for redemption included January 1, 1899 (Record, p. 13).

It is ridiculous for defendants to claim that the original time of 45 days was too short, when Buckley was in arrears for years and knew whether he could redeem or not, and when, in his petition to obtain the right, which he had lost only by reason of his appeal, he asked for far less time than 45 days and was only granted 12 days in which to do the same thing (Record, p. 68). On getting the 12 days both he and his counsel decided that they did not want to redeem (Record, p. 105)—something, by the way, which they both knew all along. It is only necessary to refer to the original opinion (page 66) to show that the claim that the time allowed to redeem was too short was neither made by counsel nor considered by the court.

Defendants in error rely chiefly on the point that after the mandate had gone down the lower court entered up a decree changing the time when redemption could be made, and, as the date so changed was the same one up to which Buckley could remain in possession, it is claimed this extended his right to so remain in possession.

It is perfectly clear that neither the petition for rehearing nor the opinion of the upper court thereon in any manner referred, in terms, to Buckley's right to remain in possession. It is contended in favor of the sureties of one who has wasted and destroyed his opponent's property that this order should be extended by construction to cover "possession."

It seems clear that the question as to whether the appeal was prosecuted to effect was determined conclusively by the action of the upper court, and the lower court could no more affect the question than could one which never had any jurisdiction over the controversy.

Davis *vs.* Patrick, 57 Fed., 909.

Babbitt *vs.* Shields, 101 U. S., 7 (25 L. Ed., 820).

The lower court had no jurisdiction to amend its original judgment, except in accordance with the mandate.

Counsel have cited certain cases to show that in order to

hold the sureties on a bond, the judgment must be affirmed in every particular. In so far as they do not sustain any such position, they are at variance with the authorities, including those of this court, cited by us, and we submit that they are at variance with the spirit of the legislation in respect to supersedeas bonds, which is remedial in its nature.

In closing, we submit that Buckley and his sureties are asking that the effect of the decree made by the upper court be extended to include something for which he did not ask in his petition and to which the court did not refer in its order, while at the same time Buckley has been guilty of the most flagrant bad faith in not asking for that which he wanted and in perverting that which was allowed to him to purposes not intended by those granting it, while at the same time he has destroyed his adversary's property.

It is respectfully submitted that the judgment of the lower court should be reversed.

WILLIAM GRANT AND
CHARLES S. CUSHING,
*Attorneys for Plaintiff in Error.*

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No. 58.

# In the Supreme Court of the United States

OCTOBER TERM, 1906

*HENRY A. CRANE,*

*Plaintiff in Error,*

*vs.*

*CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,*

*Defendants in Error.*

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

# Brief for Defendants in Error.

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San Francisco, California.

PRESS OF THE JAMES H. BARRY CO.
512-514 LEAVENWORTH ST.

IN THE

# Supreme Court of the United States.

HENRY A. CRANE,
*Plaintiff in Error,*

vs.

CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS, AND TIMOTHY HOPKINS,
*Defendants in Error.*

## BRIEF OF DEFENDANTS IN ERROR.

This is a writ of error prosecuted by the plaintiff in error, Henry A. Crane, from a judgment made and entered in the Circuit Court of Appeals, Ninth Circuit, affirming the judgment, given, made and entered against him in the United States Circuit Court, in and for the Northern District of California, upon the verdict of a jury, rendered in favor of defendants in error, Cornelius F. Buckley, Rudolph Spreckels, and Timothy Hopkins.

But one question is presented for review by this Court. This question has been determined adversely to the contention of plaintiff in error upon two oc-

casions by the said Circuit Court of Appeals, and arises out of the following facts:

On the 16th day of November, 1898, the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, made and entered its decree, in a certain suit therein pending, wherein the plaintiff in error, Henry A. Crane, was the complainant, and C. F. Buckley, one of the defendants in error, was defendant, wherein it adjudged and decreed that said Henry A. Crane, was the owner in fee simple, of certain real property therein described. It further ordered, adjudged and decreed that all of the rights, interest and claims of said C. F. Buckley in and to said real property were forever foreclosed and terminated, subject to the equitable privilege that if he should pay to said Henry A. Crane at any time prior to the 1st day of January, 1899, the unpaid portion of the purchase price of said property, to-wit: $60,000 with interest thereon, and certain taxes and costs, the said Henry A. Crane should convey to him all of said real property, pursuant to an agreement to purchase theretofore made and executed between them.

Said judgment further provided that if the payment should not be made by said C. F. Buckley, *THEN all of his right, interest and claim in and to said real property should be forever foreclosed and terminated, and that said C. F. Buckley should*

*be removed and turned out of and from the possession, use and occupation thereof, and that said Henry A. Crane should be placed in and restored to such possession.*

It further adjudged that unless the said C. F. Buckley *on or before* said 1st day of January, 1899, filed some satisfactory evidence that he had paid or tendered said money, a writ of possession should issue to the marshal of said Court directing him to remove said C. F. Buckley from the possession of said premises; and to place said Henry A. Crane in the exclusive possession, use and occupation thereof. (Record pages 6-11 ).

From the language contained in, and terms of this decree, it will be observed by the Court that at the time it was made and entered, the said C. F. Buckley was and for a long time prior thereto had been in the exclusive possession, use and occupation of said land, and that the Court itself did not consider that he could or should be removed from the possession thereof until *after* the expiration of the time during which he had the right to complete the purchase of the said real property by paying to the plaintiff in error, Henry A. Crane, the amount found to be due, by said Court, as the balance of the said purchase price.

Thereafter, the said C. F. Buckley, being dissatisfied with said decree, prosecuted an appeal there-

from to the United States Circuit Court of Appeals; and for the purpose of staying the execution of said judgment, as to costs, *and in so far as it directed the restitution of the possession of said premises,* he filed with the Clerk of said Circuit Court a supersedeas, bond, in the sum of eight thousand dollars, executed by him as principal, and by Timothy Hopkins and Rudolph Spreckels, the remaining defendants in error herein, as sureties. This bond contains the following language:

> "Whereas, the said respondent and cross-complainant is desirous of staying the execution of the said judgment so appealed from *in so far as it relates to the possession of the land and premises involved therein,* and is desirous of staying the execution of said judgment or decree, so appealed from, in so far as it relates to the costs awarded to complainant therein.
>
> "Now, the condition of the above obligation is such that if the said C. F. Buckley *shall prosecute his appeal to effect,* and shall answer all damages and costs that have been and shall be awarded against him, if he fails to make his appeal good, *and if he shall answer all damages that shall accrue to the said respondent by reason of the value of the use and occupation of the land and premises from the time of said appeal until the delivery of possession thereof to said Henry A. Crane, and for all waste committed thereon, then the above obligation to be void,* else to remain in full force and effect." (Record pages 14-16.).

On the 2d day of October, 1899, the Circuit Court of Appeals, being the Court to which said appeal was taken, rendered its judgment affirming the decree of the lower Court. (Rec. p. 66-7). Thereafter, the appellant therein, C. F. Buckley, filed with the said Circuit Court of Appeals, a petition for the rehearing of said appeal, and on the 19th day of October, 1899, said Court of Appeals, modified its former decision, and in its opinion, rendered upon said rehearing, used the following language:

> "The record does show that the appellant *made large payments under the contract,* and that he has made other large expenditures in the improvements of the property, which was the subject of the contract. It is also true that the sums remaining due from the appellant under the contract were large. These payments, the decree of the Court below, which was entered on the 16th day of November, 1898, required to be made prior to January 1st, 1899, *in order that the rights and interests of the appellant in the property be saved,* WHICH WERE BY THE DECREES OTHERWISE FOREVER FORECLOSED AND ENDED. Under the circumstances appearing in the record this Court is of the opinion that it is equitable and just to allow the appellant until the 1st day of November, 1899, within which to make the payments required by the decree from which the appeal is taken, and, accordingly, it is ordered that the judgment of this Court on the 2d day of October, 1899, be, and hereby is, so modified as to read: 'Cause remanded to the Court below, with direc-'tions to substitute for the first day of January,

> '1899, the first day of November, 1899, within 'which the payments therein provided for are 'permitted to be made, and, as so modified, the 'decree is affirmed.'" (Record pp. 68-9.)

Thereafter, the mandate of said Court of Appeals, issued to the lower Court, by which the lower Court was directed to modify its decree by substituting for the 1st day of January, 1899, the 1st day of November, 1899, within which the payments therein provided for are permitted to be made. (Record pp. )

Pursuant to this writ of mandate, the United States Circuit Court made and entered its final decree, which contained the following provision:

> "It is hereby ordered, adjudged and decreed that the former decree of this Court made and entered herein on the 16th day of November, 1898, be and the same is hereby modified by substituting for the words and figures 'first (1st) day of January, one thousand eight hundred and ninety-nine,' where the same occurs on pages 4, 5, and 6, of said former decree, the words and figures 'first (1st) day of November, 1899,'" (Record pp. 73 ). No appeal was ever prosecuted from this decree, so that it became the final decree in the action in which said appeal aforesaid was prosecuted, and upon which appeal said supersedeas bond was given.

As the date "January 1, 1899," only appeared in the original decree on the pages designated in the modifying decree, it will be observed by the Court that the effect of this modifying decree was to substitute

the first day of November, 1899, for the first day of January, 1899, wherever it occurred in the original decree, so that under the decree as modified, the estate, rights and interest of said C. F. Buckley, the defendant therein, in and to the premises involved in the controversy were NOT foreclosed or terminated, and he *was entitled to remain in possession of the premises and could not be dispossessed therefrom until the first day of November, 1899; nor could a writ of possession have issued until after that date.* On November 1, 1899, said C. F. Buckley was ready to deliver possession of said premises over to plaintiff in error, but at the request of plaintiff in error actual possession was not finally given him until November 4, 1899. (Record, p. 104-6)

This action was commenced against the defendants in error by the plaintiff in error to recover the sum of $8000, the penalty of said bond, for the alleged value of the use and occupation of said premises, and for waste alleged to have been committed by said C. F. Buckley thereon between the first day of January, 1899, and the first day of November, 1899. (Record, pp. 1-6.) The costs of said action were not involved as they had been paid in full before the commencement of the action.

Upon the first trial in the lower Court, the defendants in error contended, as they still contend, that by reason of the modification by the Circuit Court of

Appeals of the decree entered in the original action, wherein plaintiff in error was complainant, and defendant in error, C. F. Buckley, was defendant, and by reason of the final decree made by the Circuit Court in that action, pursuant to the mandate of the said Court of Appeals, from which no appeal was ever taken, the original decree was so modified as to permit the defendant therein to *remain in possession of said premises until November 1st, 1899, by virtue of the terms of the decree,* for which reason he complied with the conditions of the bond, and did prosecute said appeal to effect, so far as the possession of the premises was concerned; in other words, that under the decree in said action as modified, and not because of the supersedeas bond given by him upon said appeal, he had a right to remain in possession of said premises until November 1st, 1899, when, and not until when, his interests were terminated, and the writ of possession would be permitted to issue.

Upon the first trial of this case, the Circuit Court refused to instruct the jury in accordance with the theory upon which the defense proceeded, and, accordingly, a verdict of $5,000 was rendered by a jury, upon which judgment was entered against defendants in error. (Record, p. 44-5) Subsequently this amount was reduced to $3,000, upon motion for new trial. (Record, p. 48.)

From this judgment, as modified, an appeal was prosecuted by defendants in error to the Circuit Court of Appeals, which, after a full consideration of the case, rendered its decision, sustaining the contention of the defendants in error, and reversing the judgment of the lower Court.

In its opinion, the Circuit Court of Appeals reviewed its decision in the original suit in equity in which the supersedeas bond was given, and held *that in modifying the decree in that case it intended not only to extend the time during which the appellant therein, C. F. Buckley, had a right to make the payments until November 1, 1899, but likewise directed that until that date his interest in the property, which included his right to remain in possession thereof, should not be foreclosed.* (Record, p. 173)

From this decision, so rendered by the Circuit Court of Appeals, no appeal was taken to this Court, and it, therefore, became the law of the case. Subsequently, another trial was had in this action, in which, under appropriate instructions, following the decision of the Circuit Court of Appeals, a jury rendered a verdict in favor of the defendants in error. (Record, p. .) Another appeal was taken by the plaintiff in error to the Circuit Court of Appeals, which again reviewed the question formerly considered and determined by it, and affirmed the judgment of the

Court below. (Record, p. 162) From this judgment, this writ of error is prosecuted.

Under these circumstances, the sole question to be determined by this Court upon this writ of error is whether the said C. F. Buckley, in the original action wherein plaintiff in error was complainant, and the said C. F. Buckley was defendant, did prosecute his appeal to effect, so far as the possession of the said premises was concerned, between the first day of January, 1899, and the first day of November, 1899. If so, as has already been determined upon two occasions by the Circuit Court of Appeals, by which the modified decree was made, then the judgment of the lower Court must be affirmed.

## ARGUMENT.

### I.

### THE RIGHT OF DR. C. F. BUCKLEY TO REMAIN IN POSSESSION OF THE PREMISES WAS CO-EXTENSIVE WITH HIS RIGHT TO COMPLETE THE PAYMENT OF THE AMOUNT ADJUDGED TO BE DUE HENRY A. CRANE.

From the decree rendered in the original action of "*Henry A. Crane* vs. *C. F. Buckley*," it may be gathered that some years prior to the commencement of that suit, C. F. Buckley, one of the defendants in error, and Henry A. Crane, plaintiff in error, entered

into a contract for the purchase by said C. F. Buckley, from said Henry A. Crane of the real property described in said judgment and decree, and that by reason of said contract the said vendee, C. F. Buckley, was given possession thereof. Upon this contract, as it is stated in the decision of the Court of Appeals rendered upon the petition for rehearing in that suit, the said C. F. Buckley had paid to Henry A. Crane a large amount of money.

Under such circumstances, where the vendor enters into a contract for the sale of real property, but retains the legal title thereto in his own name until the balance of the purchase price has been paid, and as security therefor, such security is in the nature of a mortgage, as was said in the case of

*Gessner* vs. *Palmateer*, 89 Cal., 91-97.

> "Where the vendor holds the legal title under an unexecuted contract for the conveyance of the land upon payment of the purchase money, the transaction shows upon its face that he holds it as security. The vendee cannot prejudice that title, or in any way divest it, except by performance of the act for which the vendor holds it. The vendor's security is something stronger than a mortgage, because the legal title is retained as security (cases cited). It has been called an imperfect or equitable mortgage, which is a more appropriate term than vendor's lien. In many of the best considered cases, including *Sparks* vs. *Hess*, 15 Cal., 186, it is treated as if it had the similitude of a mortgage, *subject to foreclosure in the same way*

*a mortgage is foreclosed.* * * * Where the title is not to pass until the vendee pays the purchase price, the land is by express contract held in pledge for such payment, and the notes and contract may be considered as an instrument in the nature of a mortgage. It is a lien by contract, is an incident to the debt, and the assignee of notes given for the purchase money, like the assignee of a note secured by mortgage, is entitled to the benefit of the security.

"There are a few decisions to the contrary, some of which inveigh against the rule, and emanating, as they do, from highly respectable authority, are entitled to careful consideration; but they bear evidence of a departure from sound legal rules, and will be found generally to have been influenced by decisions in cases where the legal title had passed to the vendee, thus overlooking the distinction we have attempted to point out, and which is paramount always in determining questions of this kind. The authorities preponderate very decidedly in favor of the view we have expressed."

And in the case of

*Dingley* vs. *The Bank of Ventura,* 57 Cal., 471,

where the deed of conveyance expressly reserved a lien for the balance of the purchase price, the Court said:

"The lien reserved by Huse was something more than a vendor's lien. * * * In the case under consideration the purchase price remaining unpaid, was *not* unsecured, otherwise than by

personal obligation of the buyer, for the parties to the deed expressly contracted that the vendor should have a lien for the unpaid purchase price. It is not, therefore, a vendor's lien, but rather a lien secured to the vendor by the contract of the parties. It was, in effect, though not technically, a mortgage. In *Jones on Mortgages,* paragraph 229, it is said: 'A lien for the purchase money, expressly reserved by a vendor in his deed of conveyance, is a lien, created by contract and not by implication of law. It is a contract that the land shall be burdened with the lien until the note is paid. It is really a mortgage. The lien, then, becomes a matter of record when the deed is recorded. It is not waived by the taking of other security, as in the case with an ordinary vendor's lien. It is governed by the rules that a mortgage is. It passes by an assignment of the note secured by it. It is foreclosed as a mortgage is, and there is the same right of redemption for a limited period after a foreclosure sale.' * * * A Court of Equity looks through the form to the substance of the matter before it, and where, as here, it finds a contract in the deed of conveyance securing to the vendor a lien on the land sold for the unpaid purchase price, it treats it as, what is substantially, a mortgage."

See, also,

*Avery* vs. *Clark,* 87 Cal., 619.

In

*Sparks* vs. *Hesse,* 15 Cal., 194.

where the vendor entered into a contract with the

vendee for the purchase and sale of certain real property, the conveyance of the same to be executed when the balance of the purchase price was paid, the Court used the following language:

> "The Court after determining the amount of the lien, can by its decree direct a sale of the property in the first instance for a satisfaction, and execution for any deficiency, or award an execution in the first place, and a sale only in the event of its return unsatisfied, as the justice of the case and the equity developed in its progress may require. * * * This is not a suit to enforce a vendor's lien, after conveyance executed, but to enforce such a lien where the contract of sale remains unexecuted. * * *
>
> "In the present case the vendors have retained the legal title, and evidently as security for the purchase money. *Their position is, in some respects, similar to what it would have been had they executed a conveyance to the vendee and taken from him a mortgage upon the property.* A mortgage is in form a conveyance of the legal title, though entendered only as a security for the debt. Here the title is retained by the vendors for a particular purpose, for a similar purpose of security. A mortgagee may pursue his remedy at law, or proceed in equity for the sale of the premises. A vendor retaining the title may in like manner sue at law for the balance of his purchase price, or file his bill in equity for the specific performance of the contract, and take an alternative decree that if the purchaser will not accept the conveyance and pay the purchase money, the premises be sold to raise such money, and that the vendee pay any deficiency remaining

after the application of the proceeds arising upon said sale. * * *

"The vendor is at liberty to ask either a decree, directing performance, and in case of refusal, a sale of the premises, or a decree barring the right of the vendee to claim a conveyance under the contract. He may, however, insist upon the sale, where the performance is refused, and is not bound to take a mere foreclosure of a vendor's right to a deed. * * * The form of the complaint was more that of an ordinary complaint in a mortgage case than a complaint for specific performance, *and the decree is not, as it should be, in the alternative.*"

It is clear from these authorities, therefore, that where the vendor retains the legal title in himself as security for the payment to him of the unpaid portion of the purchase price, the security thus retained is in the nature of a mortgage. This being true, it must necessarily follow that the vendee possesses practically the same rights as he would have possessed had the vendor executed to him a conveyance, and as security for the balance of the purchase price, procured from the vendee a mortgage upon the real property. In such a case the mortgagor would have the right to remain in the possession of the mortgaged premises, not only until after judgment of foreclosure had been rendered and a sale of the premises effected, but until his right to redeem from the foreclosure sale should have expired, for as long as his equity of redemption existed just so long did he possess some right, interest

and estate in the property, which would become converted into a fee simple estate upon his paying the amount due the mortgagor. As was said in

*Purser* vs. *Cody*, 120 Cal., 218,

> "The plaintiff acquired no right to the possession of the property by virtue of the sale to him under the judgment in the action to foreclose his mortgage against the corporation *until the time for a redemption from this sale had expired, the judgment debtor or its successor in interest in the property was entitled to its possession.*"

Where suit is commenced by the vendor, who has retained legal title in himself to declare terminated the rights and interests of the purchaser, the Court before whom the action is tried, if the allegations of the complaint are true, *is obliged to enter a decree in the alternative* permitting the vendee to complete his purchase or pay the balance due as found by the Court within a certain time, and determining that if such be not done, then *at the expiration* of that time all his rights and interests in the premises be forever terminated and foreclosed. Until, however, the expiration of this equitable privilege afforded the purchaser has expires, he is permitted to enjoy all of the benefits which have accrued to him by reason of his contract of purchase, *including the right to remain in the possession of the real property*. In other words, the right to remain in possession constitutes an ele-

ment of his interest in the land which is not foreclosed or terminated until he has refused to comply with the provisions of the decree by paying the amount ascertained by the Court to be due to the vendor.

So far as the right to remain in possession of the premises is concerned, the only distinction between the case where a vendor retains the legal title to the property, as security for the payment of the balance of the purchase price, and one where a vendor transfers the legal title to the vendee, taking back a mortgage, after default in the payment of the balance due, is as follows:

In the first case, the vendor has a right to bring an action, in strict foreclosure, in which the Court is obliged to make a decree in the alternative, fixing a time by which the balance due is to be paid, or at which, in the event of the failure to pay the balance due, all of the interest of the vendee is foreclosed. In this case, the vendee has a right to remain in possession of the premises until the date fixed in the decree. In the latter case, the vendor must bring an action to foreclose his mortgage, in which event the vendee has a right to remain in possession of the property until his right to redeem has expired.

It follows, therefore, that the right to remain in possession of the purchased premises *is co-extensive with the right to pay the balance of the purchase*

*price,* and that until that period of time has expired none of the rights of the vendee in and to the premises can to any extent or by any method except by agreement, be interfered with or prejudiced.

The position assumed by the defendants in error in the case at bar was appreciated by the lower Court in the suit in which the supersedeas bond was executed for the reason that the decree itself expressly provided that the estate and interest of the defendant therein, C. F. Buckley, *should not be foreclosed or terminated until the first day of January, 1899,* on or before which he was afforded the privilege of paying the balance of the purchase price. And as further evidence of this conclusion of the lower Court, it was further provided that the writ of possession to be issued in the event that the balance of the purchase price was not paid, was not to issue until *after* the first day of January, 1899.

## II.

THE APPEAL WAS PROSECUTED TO EFFECT SO FAR AS THE POSSESSION OF THE PROPERTY WAS CONCERNED, BETWEEN JANUARY 1, 1899, AND NOVEMBER 1, 1899, AND, THEREFORE, THE SURETIES UPON THE SUPERSEDEAS BOND WERE RELIEVED FROM ALL LIABILITY TO PLAINTIFF IN ERROR.

It will be remembered by the Court that the *SOLE* consideration for the execution of the supersedeas bond by the defendants in error was to stay the effect

of the decree entered by the Court below in the suit in which it was given *ONLY so far as it effected the possession of the property,* and the costs of that suit. These costs were afterwards paid in full before the commencement of this action, are not referred to in plaintiff's complaint, and are, therefore, not involved in this action.

The supersedeas bond, having been executed by the defendants in error for the purpose of permitting the said C. F. Buckley to retain possession of the said premises during the pendency of said appeal, if the effect of the decision of this Court upon that appeal was such as to have extended Dr. Buckley's right to remain in possession of the said premises until the first day of November, 1899, by virtue of the decree itself, then it follows that there was no consideration for the bond, and that so far as defendants in error in this case are concerned, the appellant in that case, C. F. Buckley, did prosecute his appeal to effect.

That such was the effect of the decision rendered by the Court of Appeals must be apparent.

The original decree, as made by the Circuit Court, as has already been shown, provided that the defendant therein, Dr. C. F. Buckley, should have until January 1, 1899, a period of less than half a month, within which to pay to the complainant, Henry A. Crane, the amount adjudged to be due by the Court, or on said date suffer all of his interests in said prop-

erty, including his right to remain in possession, to be absolutely foreclosed. It was also provided that if said payments were not made, then the writ of possession should issue at any time after said 1st day of January, 1899.

Let us assume that instead of fixing the date upon which said payment was to be made, said rights foreclosed, and said writ of possession issued, as "January 1, 1899," the Circuit Court had provided that the defendant, Dr. C. F. Buckley, should have until November 1, 1899, within which to make such payment, and that upon his failure to make such payment at that time, his interest in said property would be foreclosed, and a writ of possession issued, and let us assume further that an appeal had been taken from such decree to the Circuit Court of Appeals, and a supersedeas bond given to stay the execution of said judgment, so far as the possession of the premises was concerned, and such decree had been affirmed upon such appeal. If an action were thereafter commenced by Henry A. Crane, against the sureties upon said supersedeas bond to recover the value of the use and occupation of said premises, and for all waste committed thereon between January 1, 1899, and the 1st day of November, 1899, would not the sureties establish a complete defense to said action by showing that *by the very terms of the judgment* from which the appeal had been taken, the appellant had

an absolute right to remain in possession of the property, because his interests therein, including his right to remain in possession, were not foreclosed until November 1, 1899, at which time he had tendered to Crane the possession of said premises, and that, therefore, the execution of the supersedeas bond was entirely unnecessary, and without consideration? That no recovery could be had in such an action is beyond all question. And if we are correct in this assumption, it likewise follows that no recovery can be had upon the supersedeas bond herein involved.

In the decision rendered by the Circuit Court of Appeals, upon the appeal taken to it by Dr. C. F. Buckley, from the decree made and entered by the Circuit Court, it in effect determined that while the decree was correct and should be affirmed as to all matters excepting the fixing the date by which Dr. Buckley had to make his final payment, and upon which, in the event of his failure to make such payment, his rights would be foreclosed, it was inequitable and unjust, in view of the large amount of money paid to Crane, and expended by Dr. Buckley upon said premises, to allow him so short a time as it did within which such payment should be made, or his rights foreclosed. And, in that respect, it had committed error, while it affirmed the judgment in so far as all other matters were concerned, it *in effect* reversed it in so far as it related to Dr. Buckley's right

to remain in possession of the premises only until January 1, 1899, extending such right until November 1, 1899, before which time possession of the premises was tendered by him to Crane. In other words, if, instead of affirming the judgment, the Circuit Court of Appeals had reversed the judgment, with instructions to enter a judgment similar to that entered by the lower Court upon the filing of its mandate, the plaintiff in error would concede that the appeal had been prosecuted to effect. Can it then be held, that because the Circuit Court of Appeals, instead of taking this action, itself modified the original decree, and directed the lower Court to enter a judgment in accordance with its determination, which judgment (if it had been the original judgment in the case) would have rendered the execution of a supersedeas bond unnecessary, it caused the sureties upon such supersedeas bond to become responsible to complainant?

That such cannot be the law is evident from a mere statement of the proposition itself. And that the Court below so construed the decision of the Court of Appeals is evidenced by the fact that *pursuant* to the writ of mandate issued by the Court of Appeals, it made and entered a final or modifying decree, in which it not only extended the time within which these payments should be made until and including November 1, 1899, but in addition thereto, changed

the date upon which said C. F. Buckley's interest in the premises (which included his right to remain in possession), should be terminated and foreclosed until *November 1, 1899.*

This decree was prepared by *Counsel* for plaintiff in error, as appears from the endorsements thereon (Record, p. 73), and they themselves must have been forced to the same inevitable conclusion. But in any event, it was a final determination of that controversy, for the reason that no appeal was ever taken therefrom, so that at the commencement of this action, the final decree in the litigation in which the supersedeas bond was executed, and which superseded the original decree, *actually provided that the said C. F. Buckley's interest in and to said premises should not terminate until November 1st, 1899, and that no writ of possession should issue directing the Marshal to place the said Henry A. Crane, in possession, until after that date.* (Record, p. 73.)

But without recourse to this final decree, which is conclusive, between the parties, it must be apparent to the Court that the modification of the original decree, as directed by the Court of Appeals, extending the time within which Dr. Buckley could pay to said Crane the balance due him, also carried with it the right to remain in the possession of the premises, for, as we have already stated, just so long as he had the right to pay the balance of the purchase price and

receive from Crane a deed of conveyance, just so long did his right to remain in the possession of the premises exist; for as long as he had a vested right to receive a conveyance of the property upon completing the payments, just so long did he possess an interest therein.

Suppose on or before November 1, 1899, Dr. Buckley had paid to Henry A. Crane the balance of the purchase price, and had received from him in consideration thereof a conveyance of the premises, would the defendants in error in that event have been obliged to pay to Crane the value of the use and occupation of the premises, or for any waste which might have been committed thereon between January 1, 1899, and November 1, 1899? Obviously not. And if not, then it must logically follow that Crane cannot recover, under the circumstances disclosed by this record, for the reason that just so long as the defendant in an action in strict foreclosure has a right to complete the purchase price found to be due by the Court, just so long does his interest in the property, which carries with it the right of possession where he has been placed in possession pursuant to the terms of a contract, remain unimpaired.

It is suggested by plaintiff in error that if Dr. C. F. Buckley exercised the right given him by the decision of the Court of Appeals, he would have been entitled to receive from Buckley the amount of in-

terest that had accrued upon the amount found to be due him by the Court, until the option was exercised. This, however, is a false quantity in the controversy.

If Dr. Buckley on the 1st day of January, 1899, had exercised the option given him by the lower Court, he woulld have been obliged to have paid interest to that date, nevertheless, he was entitled to remain in possession of the property until that time, irrespective, even though he had no intention of making such payment. If, by the judgment of the lower Court, this date had been fixed at November 1, 1899, instead of January 1, 1899, the same result would have followed. While Buckley would have been compelled to pay accrued interest up to the time he exercised the option—if he did exercise it—in the event of his failure so to do, he would have been entitled to remain in possession of the premises until November 1, 1899, without making any payment whatever. This period of time is fixed by the lower Court, after taking into consideration, the amount of principal and interest already paid by the vendee, which, upon foreclosure, constitutes a total loss to him.

In the case at bar, Dr. C. F. Buckley had paid Crane on account of the purchase price of the property nearly $60,000, and in addition thereto had expended vast sums of money in improving and endeavoring to reclaim from alkali the premises in

question. These moneys represented a total loss to him. It was evidently because of these facts that the Court of Appeals rendered the judgment, to which reference has already been made.

The only part of the decree entered in the lower Court in the action in which the supersedeas bond was given, with which the appellants in this case were or are concerned, is that part relating to the possession of the property. This is apparent because if the original decree had provided that Dr. Buckley should have until November 1, 1899, in which to complete the payment for the property, and that until the expiration of that time his rights to an interest in the premises involved in said suit should not be terminated, and that no writ of possession to oust him from the occupation thereof could be executed or issued, then there would be no consideration for a bond for the reason he would have retained possession of the land, *not* because of any supersedeas bond, but because of his right so to do created by his contract with Crane and the judgment of the Court rendered thereon.

*Powers* vs. *Crane,* 67 Cal., 65.
*Powers* vs. *Chabot,* 93 Cal., 263.
*McCallion* vs. *Hibernia S. & L. S.*, 98 Cal., 442.

Therefore, if the original decree was modified by

this Court so as to effect the same result, it must likewise follow that the appeal of Dr. Buckley to this Court from the decree, *so far as the right to remain in the possession of said property until November 1, 1899, was concerned, was prosecuted to effect, and no breach of the supersedeas bond occurred.*

It is well settled that the surety's obligation is *strictissimi juris,* and that he has a right to stand upon the precise terms of his contract.

*Elder* vs. *Cutner,* 97 Cal., 490.
*People* vs. *Bustis,* 11 Cal., 220.
*McDonald* vs. *Fett,* 49 Cal., 355.
*Pierce* vs. *Whiting,* 63 Cal., 543.

And the modification of the original decree, being in effect a reversal of that decree, so far as it purported to limit Dr. Buckley's right to the possession of the land to January 1, 1899, which was the SOLE portion of the decree on appeal for which the supersedeas bond was given, released the plaintiffs in error from all liability to the defendant in error.

In so holding, the Circuit Court of Appeals in this very action, speaking through Mr. Justice Ross, the learned Judge by whom the decision of that Court in the original action was rendered, after reviewing the facts, said:

"As will have been seen, the purpose of the bond sued on was the staying of the execution of

the decree appealed from in so far as it related to the possession of the land and premises involved therein, and in so far as it related to the cost awarded to the complainant therein, and its condition was that Buckley should prosecute his appeal to effect, and answer all damages and costs awarded against him in the event he should fail to make his appeal good, and pay all damages that should accrue to the respondent, Crane, by reason of the value of the use and occupation of the land and premises from the time of the appeal until the delivery of possession thereof to him, and for all waste committed thereon.

"We do not understand the learned counsel for plaintiffs in error to deny that for the waste and for the value of the use and occupation of the premises by Buckley after the expiration of the time fixed by the modified decree within which he was allowed to complete the payment for his property, the plaintiffs in error are liable; but he insists that for the use and occupation of the premises by Buckley up to the expiration of that time, neither he nor his sureties are responsible on the bond. Instructions to that effect were requested by the plaintiffs in error, and refused by the Court below, and, instead, the jury was instructed that the plaintiff in the action (defendant in error here) was entitled to recover upon the bond the value of the use and occupation of the land and premises from January 1st, 1899, which was the time fixed by the Circuit Court in the decree as originally entered within which Buckley was permitted to complete his payments for the land and premises, and secure title thereto. The theory of the Court evidently was that it was apparent from the original decree, as indeed it is, that Buckley was, under the contract of sale and

purchase, put into possession of the premises and was entitled to their use and occupation during the life of the contract. According to the decree as originally entered that life ended January 1st, 1899, unless Buckley, prior thereto, complied with the conditions of the decree.

"It is true that this Court, by its judgment first given, affirmed that decree, but upon a petition for a rehearing, it reconsidered its judgment and directed the Court below to modify the judgment from which the appeal was taken by substituting for the first day of January, 1899, the first day of November of the same year, which was done—thus extending the time within which Buckley was permitted to make the deferred payments and secure the title to the property contracted for, and in effect, keeping in force the provisions of the agreement, including the right of possession of the premises in Buckley until the day last named. This was a substantial modification of the original decree of the Circuit Court, gained by virtue of the appeal, which cannot, therefore, be properly said to have been without effect. We are of the opinion that the defendant in error was no more entitled to recover the value of the use and occupation of the premises in question during the enlarged time finally granted Buckley within which to make good his covenants, than for the period of grace first fixed by the trial Court, in respect of which the defendant in error asserts no right even in his complaint.

"The judgment is reversed, and cause remanded for a new trial." (Record, pp. 171-173, ...., Fed., .)

This decision should be conclusive authority upon the legal proposition to be determined by this Court,

for the reason that it was rendered by the very Court which had rendered the former decision under consideration, and that Court, better than any other Court, was in a position to know what it intended by using the language contained in its former decision.

The same proposition was again called to the attention of the Circuit Court of Appeals, upon the writ of error prosecuted to it by the plaintiff in error, from the second judgment entered therein, and was determined by it in the following language:

> "The only point involved in this writ of error is, 'Did the defendant Buckley prosecute his appeal to effect?' The question was answered in the affirmative by this Court in *Buckley* vs. *Crane*, 123 Federal, 29, 33. The rulings of the Court below in the trial of the present case, were in accord with the views heretofore expressed by this Court." (See Record, 162-3.)

In addition to these two decisions, however, we desire to direct the Court's attention to the following cases which sustain the contention of defendants in error:

In

*Heinlen* vs. *Beans*, 71 Cal., 295.

which was an action for specific performance, the plaintiff recovered a judgment against defendants for

the sum of $10,000, the value of the use and occupation of the land in controversy, and directing the defendants to execute a deed of conveyance of the land to plaintiff, and deliver to him possession thereof. An appeal was taken from this judgment and from an order subsequently made denying defendant's motion for a new trial. On this appeal the defenadnts filed a supersedeas bond, which contained the following language:

> "And whereas the appellants are desirous of staying that part of said judgment directing said defendants and appellants to execute a deed to said plaintiff and respondent, and also to deliver to the plaintiff the possession of the premises described therein, and the Judge of this Court having fixed the amount of the undertaking for that purpose at five thousand dollars;
>
> "Now, therefore, in consideration of the premises, and the said stay of the execution of the judgment, we do further jointly and severally undertake and promise, and do acknowledge ourselves bound in the further sum of five thousand dollars, that during the possession of such property by the appellants they will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal be dismissed, they will pay the value of the use and occupation of the property from the time of the appeal to the delivery of the possession thereof, pursuant to the judgment, not exceeding said sum of five thousand dollars."

On appeal the judgment was reversed for the sole

reason that the judgment should be for five-sixths of the land, instead of the whole, and for a like proportion of the rent from a certain date, and the cause remanded with instructions to the Court below, TO MODIFY *the judgment in accordance with the opinion, and enter judgment in favor of plaintiff for that proportion of the land and the $10,000.50.*

The remittitur was transmitted to the Court below with the judgment of said Court and its opinion containing the directions with reference to the modification of the judgment. Pursuant to this remittitur, the Court MODIFIED the judgment. No testimony was taken or other proceeding had.

On appeal from the judgment in favor of plaintiff against the sureties on the bond, the Supreme Court said:

> "The contention of defendant is, that there is no breach of the undertaking committed by them until the affirmance of the judgment, or the dismissal of the appeal. The plaintiff concurs in this view, and such are the words of the undertaking. By its express words the defendants only agree to pay when the judgment *is affirmed or the appeal dismissed.* But the plaintiff puts forward the contention that the judgment in *Heinlen* vs. *Martin* was affirmed. The Court below was of the same opinion, and so held. Now, if this judgment was affirmed at all, *it was only affirmed in part*, and the undertaking does not impose on the parties the obligation to pay on any such contingency, *but only in case the judg-*

*ment appealed from is affirmed.* We construe this to mean affirmed as rendered by the Court below. It does not mean affirmed in part. * * *

"For the reasons above given, the judgment and order are reversed and cause remanded, and the Court below is directed to enter judgment for defendants."

And as evidence of the fact that the Supreme Court itself considered that the judgment entered by the lower Court in the case last cited, pursuant to the remittitur was in effect the same as though the judgment had been modified in the appellate tribunal, it subsequently dismissed an appeal taken from the judgment as modified upon the ground that no appeal could be taken therefrom, and seriously considered the proposition that the attorneys prosecuting the appeal might be guilty of contempt for so doing.

*Heinlen* vs. *Beans,* 73 Cal., 340.

The case under discussion is much stronger than the case last cited for the reason that the very part of the judgment entered by the Court below to stay the execution of which the supersedeas bond was given was so modified by this Court that if the original decree from which the appeal was taken had been in the same condition in which it was after the modification was made, then the appellant, C. F. Buckley, would have been entitled to remain in pos-

session of the property until November 1, 1899, several weeks after the appeal had been finally determined, and it would not have been necessary for him to have given any supersedeas bond at all.

And in the case of

*Chase* vs. *Ries,* 10 Cal., 518

Mr. Chief Justice Terry, speaking for the Court, said:

> "This is an action of an appeal bond executed by defendants conditioned to pay the judgment appealed from, if the same should be affirmed by the Appellate Court.
>
> "It appears from the record that the judgment appealed from was reversed, *with directions to the Court below to enter a different judgment,* consequently, no liability attached to defendants under the conditions of the bond."

This case was cited with approval in the case of

*Heinlen* vs. *Beans, supra.*

In *re Hawes* vs. *Sternheim, Executrix,* 57 Ill., App. 126, which was an action based upon an appeal bond, it appeared that the deceased executed a bond on appeal from the Apellate Court of Illinois, to the Supreme Court, from a judgment rendered in a case of forcible entry and detainer. The bond was in the penal sum of $8000, and contained the following provisions:

"The condition of the above obligation is such that, whereas, the said B. F. Hawes did on the 4th day of May, 1892, in the Circuit Court of Cook County, aforesaid, recover a judgment against the above bounden Joseph Zuckerman for the restitution of certain premises, described as follows (Describing them): from which judgment an appeal has been taken. * * * * *

"Now, therefore, if the said Joseph Zuckerman *shall prosecute said appeal to effect* and pay all rent due or that may become due before the final determination of the suit, and also all damages and loss which the said B. F. Hawes may sustain by reason of the withholding of the premises in controversy, and by reason of any inury done thereto, during such withholding, until the restitution of the possession thereof to the said B. F. Hawes, together with all costs that may accrue in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void, otherwise to remain in full force and effect."

On appeal from a judgment rendered in favor of the defendants, the Court held that the obligors were liable ONLY in the event that the "Judgment from "which the appeal was taken SHOULD *be affirmed, or the appeal dismissed.*"

In the case of

*Daggett* vs. *Mensch,* 141 Ill., 396

which was an action upon an appeal bond given in an action of forcible entry and detainer, which bond was conditioned as follows:

"If the said Mary Mensch *should prosecute her appeal with effect,* and should pay to the plaintiff all rent then due, and that might become due before the final determination of the said suit, and all damages and loss, which the said plaintiff might sustain by reason of the withholding of the premises in controversy, and by reason of an injury done thereto, during such withholding, together with all costs until the restitution of the possession thereof to plaintiff, in case the judgment from which the appeal was taken should be affirmed or the appeal dismissed, then said bond was to be void, otherwise to remain in full force and effect."

In the complaint it was alleged "that said suit was finally terminated by order of said Circuit Court, then duly entered of record, and that said defendant did not prosecute her appeal to effect." On appeal from the judgment in favor of defendants, the Court said:

"The averment that on May 26, 1890, said suit was finally terminated by order of said Circuit Court, then duly entered of record, is manifestly insufficient to fix the liability of appellees, because the order so rendered may have been in favor of the appellees, but by the terms of the bond, they are liable only in the event *that the judgment from which the appeal was taken, should be affirmed or the appeal dismissed.*"

Judgment affirmed.

In the case of

*Poppenhausen* vs. *Selley, et al.,* 41 Barb., 450

an order was made sustaining a demurrer and rendering judgment in favor of the plaintiff. An appeal was taken and a stay bond given, which provided that the sureties would pay the penalty thereof, if the judgment should be affirmed. On appeal, the Court made an order "that the said judgment be and the "same is hereby affirmed, except that the defend- "ants have leave to answer the complaint within "twenty days." On appeal from a judgment in fafor of defendant, it was said:

> "There was no liability of the defendants under their undertaking until the condition of an *absolute affrmance was accomplished.* The defendants were to be liable only upon *absolute affirmance* of a judgment rendered upon issues of law arising upon demurrer to the complaint. * * The sureties are entitled to the protection of a strict construction in their favor, of the contract, whereby they have agreed to become bound."

Judgment affirmed.

This decision was subsequently affirmed in

*42 N. Y.*, 160.

In *Perkins* vs. *Spaulding*, Ky. (3 T. B. Mon. 12),

it was held that where an appeal was taken and a stay bond given conditioned that the appellant would prosecute such appeal with good effect and pay all costs and damages awarded against him, in

case the judgment aforesaid should be affirmed, and on a hearing of the appeal, a judgment was rendered by the Appellate Court by consent ofa ll parties, but no judgment was entered *affirming* the judgment of the lower Court, the condition of the bond was not broken, and the sureties were not liable.

In the case of

*Kibble* vs. *Butler,* 28 Miss., 587,

a stay bond was given on appeal to the Supreme Court, in a suit in equity. On the hearing of the appeal the Appellate Court reversed the judgment, but proceeded to render another judgment, which should have been rendered by the Court below, and which was in another form, *in effect, the same judgment as the one reversed.* Held on appeal that the sureties on the bond were not liable.

As we have already suggested, if the original decree provided, as the Circuit Court of Appeals determined that it should have provided, and as the Circuit Court understood the decision of the Court of Appeals when it entered its final and modifying decree, from which no appeal was ever taken, that in view of the circumstances as disclosed by the record in that case, it was equitable and just that the interest of the defendant in error, Dr. C. F. Buckley, should not be foreclosed and terminated by January 1, 1899, nor before the 1st day of November, 1899,

then it would have been unnecessary for him to have given any supersedeas bond on his subsequent appeal therefrom, and he would have been entitled to remain in possession of the land, until it was finally tendered by him to Crane. The sureties upon the bond, being interested only in the reversal or modification of that part of the decree, and the Court of Appeals having modified the decree to such an extent that it amounted to a reversal thereof, so far as the right to such possession was concerned, it necessarily follows that the appeal prosecuted by the defendant in error, Buckley, from the original decree, so far as it affected his right to remain in possession of the premises involved in that controversy, was prescuted to effect, and no breach of the supersedeas bond has occurred.

It follows, therefore, that the Judgment of the Circuit Court of Appeals was correct, and should be affirmed.

Respectfully submitted,

D. M. DELMAS,
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Dated, Oct. 15, 1906.